ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

EUGENE FORD,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition for a Writ of Certiorari
to the Montana Supreme Court

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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ISSUE PRESENTED

After the venire was dismissed and the selected jury was sworn, Ford's trial counsel asserted that the prosecution's striking of six women from the venire deprived Ford of his right to a "jury by his peers." In an interwoven analysis of federal and state law, the Montana Supreme Court determined that the objection was untimely. At issue here is whether this Court should grant a writ of certiorari to determine whether the Montana Court's decision was procedurally novel.

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STATEMENT OF THE CASE

The issue for this Court is whether it should grant certiorari to determine whether the Montana Court's decision to bar Ford's post-*Batson* era claim was procedurally novel.

Eugene Ford and Michael Paul were living together because Paul was frail and Ford had promised Paul's mother that he would take care of Michael. The night Michael was killed, witnesses saw Ford enter the parties' apartment, and then heard a physical altercation and an argument involving a loud, angry male's voice (identified as Ford's) and a "really soft" or "muffled" voice which sounded female (Paul's voice). Witnesses heard a "slap," a person "blubbering," and "stuff being knocked around and falling to the floor." It sounded as if a man were beating up his wife. When the police arrived, Ford was spontaneously and repeatedly exclaiming that he had killed Paul, stating, in part, "When I get pissed, the chances of you making it aren't good . . . . I choked him. I did so many things . . . . I think it was excessive, real excessive. I think I jumped on a corpse. I broke out in a rage . . . ." Ford exclaimed, "I killed him. I killed him. I broke his neck." Tr. III at 356-68; Tr. IV at 596-97, 604, 607, 623-24.

After he was Mirandized and waived his rights, Ford admitted, in a videotaped interview, that he was much stronger than Paul and that he had previously controlled Paul by pushing, shoving or giving him a "jolt" in the chest, which would knock Michael against the wall and then to the floor. State's Ex. 21. However, this time, Paul received multiple injuries to his head, neck, torso, liver and groin. The autopsy revealed that Paul's larynx (Adam's apple) and hyoid bone in his neck were broken. Although the

autopsy disclosed that Paul had a cancerous tumor in his intestine, it was not the cause of his death. Michael Paul died of asphyxia due to the fractures in his neck. Tr. III at 530-31, 535-36, 541-54.

Ford's prior criminal history included a stabbing, and an assault in which he held a gun to a woman's head and threatened to kill her. D.C. Doc. 94; 2/10/00 Tr. at 7-8, 28, 31-32, 35.

The twelve-person jury, which convicted Ford of deliberate homicide, was selected as follows: The fifty-five person venire was divided almost equally between men and women. Ford's counsel successfully challenged two female panelists and one male panelist for cause. The prosecution successfully challenged one male panelist for cause. Tr. II at 30-35, 76-77, 96-97, 151-52, 155-58. After challenges for cause were exercised, the final twenty-four panelists consisted of fourteen women and ten men. (App. 1.) Thus, assuming gender was not a consideration in jury selection, it was more likely that any given peremptory strike would be lodged against a female panelist.

In Montana, in a non-capital prosecution, each party is allowed only six peremptory strikes. Mont. Code Ann. § 46-16-116(1), (3). Four of the defense's strikes happened to be women. All six of the prosecution's strikes happened to be women. The sitting jury consisted of eight men and four women. Each party then struck male alternates. The chosen alternate happened to be a woman. (App. 1.)

After the venire was dismissed and the sitting jury was empanelled and sworn, Ford's trial counsel interposed the following objection:

> Your Honor, I have just a brief motion. I think the State's use of their peremptory challenges is in violation of my client's right to a jury by his peers.
>
> Of the twelve that were selected or the six that they struck, all six of them were women. Your Honor. And that is a separate identifiable group. And I feel that is a violation. I would ask for a new jury pool.

Tr. II at 195, 209-10. These were the only words uttered by Ford's trial counsel regarding the matter. A popular objection in Great Falls (Cascade County) at the time of Ford's 1999 trial was a "fair cross-section" objection. *See, e.g.*, *State v. Robbins*, 1998 MT 297, ¶ 28, 292 Mont. 23; 971 P.2d 359, *overruled by State v. LaMere*, 2000 MT 45, 298 Mont. 358, 2 P.3d 204 (1997 objection); *State v. Lopez*, 2001 MT 97, 305 Mont. 218, 26 P.3d 745 (1998 or 1999 objection).

Cascade County Attorney Brant Light responded to the objection, stating, "First, Your Honor, if I was going to get rid of women, it wouldn't be on a self-defense case. It is usually men who believe in self-defense. But I can certainly go through, if the court wants me to, as to why I made selections. I certainly just realized now that it was all, what, females?" Tr. II at 210. On appeal, Montana argued that because the case was essentially a domestic violence murder involving a male perpetrator's claim of self-defense, it was more likely that a prosecutor, inclined to discriminate, would try to exclude men. Resp. Br. at 33-34; 7/24/01 Oral Argument Tape.

The County Attorney then gave his reasons for his peremptory strikes. One of the panelists (Berg) was stricken because, in part, she was a friend of a prominent local criminal defense attorney. Another (Leraas) was stricken because, in part, she had dealings with the prosecutor's office and three attorneys reported that she would not be a

favorable juror. In addition, during voir dire, Leraas testified that she would be reluctant to sit on the jury if it meant sending someone to jail, which prompted Ford's counsel to challenge Leraas for cause on the premise that she would not be fair to the State. Tr. II at 88-89, 109-12, 210-11. At oral argument below, Montana emphasized that if the prosecutor were engaged in a plan to exclude women, defense counsel's challenge to Leraas presented him with a perfect opportunity to show his invidious intent. However, the prosecutor resisted the challenge and was then forced to remove Leraas with his last peremptory challenge. (App. 1); 7/24/01 Oral Argument Tape.

Another panelist (Grebowski) was stricken because the prosecutor believed she "was not picking up much of what we were doing and being able in a homicide case to listen to details and be able to understand some of the complexity of the case." Ford's petition recites the prosecutor's reasons for striking Grebowski, presumably because Ford believes this Court might think the prosecutor's strike was influenced by false stereotypes concerning the relative abilities of men and women. Pet. at 4. However, while none of the prosecutor's explanations were questioned by Ford's counsel at trial, the prosecutor's striking of Grebowski was never challenged on direct appeal and, at oral argument, Ford conceded that the reasons given for challenging Berg, Leraas, and Grebowski were gender neutral. 7/24/01 Oral Argument Tape. And the record reveals that Grebowski was confused. For example, after initially stating that she had never served on a jury before, she later stated that she had been on a jury "that took six weeks," at which point defense counsel cut her off and directed his questioning to other panelists. Tr. II at 173-75.

Ford's insinuation--that the merits of his purported *Batson*-claim concerned Grebowski--is false and misleading. Ford's argument on direct appeal (albeit one never made in trial court) concerned panelists Carlisle, McKinney and Leiby.

With respect to McKinney and Leiby, the prosecutor explained, "Lisa McKinney and Rita Leiby, to be really honest, was really to get to the two jurors who I thought would be really excellent, that being John Easley and James Aklestad, who I think would be good jurors for the State of Montana. So I tried to get to the point to get them. It just worked out that way as far as the numbering goes." Indeed, the prosecutor struck McKinney and Leiby with his fourth and fifth strikes, saving his last strike for Leraas, who had dealings with the prosecutor's office in a bad check case and whom three attorneys said would not be a good juror. Although the voir dire transcript supports the prosecutor's assertion that Akelstad and Easley would make good jurors, Tr. II at 41, 51-52, 81-82, 92-93, 130-33, 177-79, 193, Ford's trial counsel did not claim that the prosecutor's explanations were gender-driven or pretextual. Nonetheless, on direct appeal, Ford, for the first time, claimed that the prosecution's "only reason for striking its fourth and fifth challenges was to end up with two 'more desirable' males on the jury panel[,]" and that it "struck these two women merely to get to two men[.]" Appellant's Br. at 13, 26.

After explaining his strikes, the prosecutor stated, "I think that's it, Your Honor." Tr. II at 211. Although the prosecutor neglected to give his reasons for striking Carlisle, Ford's trial counsel never requested that the court require the prosecutor to explain his reasons for that strike.

On direct appeal, the Montana Appellate Defender's Office was appointed to represent Ford because he purportedly intended to raise claims of ineffective assistance of trial counsel. D.C. Docs. 92, 97. However, the Appellate Defender did not raise any such claims. Rather, as the Montana Court noted, "It was not until he filed his appeal that Ford first labeled his dispute over the State's exercise of peremptory challenges a 'Batson' challenge." (App. 2, ¶ 8.) And Ford asserted, for the first time, that he actually carried his burden of proof under *Batson* and *J.E.B.* in trial court and, therefore, that his deliberate homicide conviction should be automatically reversed and remanded for a new trial. Appellant's Br. at 13. At oral argument, Ford resisted a remand. 7/24/01 Oral Argument Tape.

On direct appeal, Montana argued that the Court should bar the merits because Ford's counsel made a misdirected and untimely fair cross-section objection and that Ford was changing the theory of his objection. Montana emphasized the following omissions by Ford's counsel: (1) he never cited the federal equal protection clause, or *Batson*, or *J.E.B.*; (2) he never claimed to have proven a prima facie *Batson* violation based upon disproportionate impact alone; (3) he never argued that the prima facie requirement was mooted; (4) he never asserted that the nature of the case was more likely to lend itself to invidious discrimination against women; (5) he never claimed that any of the prosecutor's explanations were pretextual; (6) he never rebutted the gender neutrality of the explanations or objected to the prosecutor's inadvertent failure to give his reasons for striking one panelist; (7) he did not allege discrimination during jury selection or that the same reasons provided for striking female panelists were equally applicable to male

panelists not stricken; and (8) he never requested a three-step *Batson* hearing. Appellant's Br. at 17-41; 7/24/01 Oral Argument Tape.

Montana argued that it would be fundamentally unfair to impugn the prosecutor or reverse the trial court under these circumstances. Montana also argued that the burden of proof remained upon Ford at all times, that Ford did not meet that burden and that, by changing the theory of his objection on appeal, Ford was attempting to improperly shift his initial and ultimate burden of proof to the proponent of the strikes in violation of United States Supreme Court precedent. Appellant's Br. at 17-41; 7/24/01 Oral Argument Tape.

The Montana Supreme Court concluded that Ford's *Batson* challenge was untimely, noting that *Batson* itself presupposes a timely objection and that the Montana Court had "consistently held that the purpose of a timely objection is to give a district judge the first opportunity to correct any error." (App. 2, ¶ 27.) Although the Court applied a different bar than Montana sought to apply, the rationale for the Court's decision was the same rationale advocated by Montana on appeal, namely, the requirement that the proponent of the strikes be given a fair opportunity to explain its strikes and that the trial court be afforded a full and fair opportunity to correct any perceived errors. Resp. Br. at 17-21. The timing of the objection was also raised at oral argument. 7/24/01 Oral Argument Tape.

Ford then petitioned for rehearing, contending that *Ford v. Georgia*, 498 U.S. 411 (1991), prohibited the Montana Court from barring a *Batson* claim in a case of first impression. The Court denied the petition, noting, "[A]s our Opinion reflects, there exists in this State a well-established body of case law requiring substantive objections to

be interposed while the district court still has the opportunity to cure the alleged defect. . . . Moreover, in addition to this well-established body of case law, § 46-16-117, MCA, statutorily requires that all jury challenges must be interposed before the jury is sworn." (App. 3.)

REASONS FOR DENYING THE WRIT

I. SUMMARY OF REASONS FOR DENIAL

Ford v. Georgia involved a very novel retroactive application of the Georgia Supreme Court's later, prospective-only decision in *State v. Sparks*, 355 S.E.2d 658 (1987), to bar a pre-*Batson* claim as untimely. It fits well within a narrow category of cases in which this Court has deemed a state court's application of a procedural bar novel. However, the Montana Court's decision here does not fit within this narrow category because Montana counsel had notice of *Batson v. Kentucky*, 476 U.S. 79 (1986), *J.E.B. v. Alabama,* 511 U.S. 127, 129 (1994), and numerous decisions requiring such claims to be timely asserted; they had notice of Montana's consistently applied and regularly followed contemporaneous objection requirement; and, they had notice of Mont. Code Ann. § 46-16-117, requiring jury challenges to be lodged before the jury is sworn.

While *Ford v. Georgia* is not controlling, Ford has failed to establish a conflict of authority or, at least, not a significant or intolerable conflict providing a compelling reason for granting certiorari review.

That Ford is accusing the Montana Court of procedural novelty is truly remarkable. Ford made a "jury by his peers" objection after the jury was sworn and the venire was dismissed. He did not allege a prima facie showing, claim that he had proven an ultimate case of invidious gender discrimination, or attack the legal sufficiency of the prosecutor's explanations until he filed his direct appeal. Contending that his initial and ultimate burden of proof could be satisfied based solely upon a non-case-specific showing of six strikes, Ford sought to shift the burden of proof to the proponent of the strikes and to turn jury selection into a disparate impact trial. While Ford's claim was both procedurally and substantively novel, the Montana Court's decision to bar it was not novel.

Finally, there is no perceivable federal interest here which would warrant disregarding Montana's and the federal forum's compatible interests in preserving the trial as the "main event" or which merits allowing the substantive law to fall victim to bad trial procedures and sandbagging.

Ford's petition for a writ of certiorari should be denied.

II. THE MONTANA COURT'S DECISION WAS NOT NOVEL.

The Montana Court's determination that Ford's objection was untimely employs an interwoven analysis of state and federal law. Therefore, under *Michigan v. Long*, 463 U.S. 1032, 1039 (1983), this Court has jurisdiction, but, for the reasons discussed below, Ford's petition should be denied.

A. The Montana Court's Decision Does Not Warrant Certiorari Review.

While Ford mostly ignores the import of the Montana Court's analysis of *Batson*, assessing the purported novelty of the Court's decision requires careful analysis of *Batson* itself.

1. The Montana Court's Decision Was Consistent With *Batson* and Its Progeny

In *Batson*, defense counsel lodged an equal protection objection before the jury was sworn based upon *Batson*'s antecedent, *Swain v. Alabama*, 380 U.S. 202 (1965). The trial court summarily denied counsel's request for a hearing. *Id.* at 83. The timeliness of the objection was not lost on this Court, which noted, "We decline . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99. Before remanding for a hearing, this Court reiterated that the objection was timely. *Id.* at 100. The petitioner in *J.E.B.* also made a clear and timely equal protection objection before the jury was empanelled. 511 U.S. at 129.

Like *Batson* itself, pre-*Batson* era cases such as *Ford v. Georgia* also involved timely objections. *Id.* at 413-14 (pretrial *Swain*-type objection). *Accord Trevino v. Texas*, 503 U.S. 562 (1992) (motion before jury selection). The same is true of post-*Batson* cases. *See, e.g., Purkett v. Elem.*, 514 U.S. 765, 766 (1995) (objection during jury selection); *Georgia v. McCollum*, 505 U.S. 42, 44-45 (1992) (objection before jury selection began); *Powers v. Ohio*, 499 U.S. 400, 403 (1991) (repeated objections made during jury selection); *Hernandez v. New York*, 500 U.S. 352, 355-56 (1991) (objection during jury selection).

When this Court decided *Batson*, it did not intend to disrupt state court proceedings or unnecessarily burden trial judges. *Batson* at 99. Rather, *Batson* was intended to allow "prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." *Hernandez* at 358. As the Montana Court observed, the remedies this Court mentioned in footnote 24 of *Batson*, "presuppose resolution of the objection **before** a jury is sworn." (App. 2, ¶ 23) (emphasis in original). And numerous federal and state courts have concluded that *Batson* challenges should be raised before the jury is sworn and/or before the venire is dismissed. (App. 2; ¶¶ 21, 23-26) (citations omitted). Ford did neither. (App. 3.)

Because *Batson* itself contemplates a timely objection, subject to the states determining when such claims will be deemed untimely according to their own laws, *Ford v. Georgia* at 423, the Montana Court's decision to bar Ford's post-*Batson* claim given preexisting Montana law was permissible and not novel. A "general rule of timeliness is especially pertinent to *Batson* challenges." *Morning v. Zapata Protein*, 128 F.3d 213, 215 (4th Cir. 1997); *see also*, *Brewer v. Marshall*, 119 F.3d 993, 1002-03 (1st Cir. 1997) (general contemporaneous objection rule deemed adequate to bar a *Batson* claim).

Ford's untimely "jury by his peers" objection undermined Montana's interest in giving the challenged attorney a fair chance to effectively defend his strikes and "deprived the district court of the ability to correct any error in the proceedings in a timely fashion." (App. 2, ¶ 27.) Application of this undoubtedly legitimate state interest to Ford's claim is consistent with the deference this Court voiced in *Batson* and *Ford v.*

Georgia, and the federal forum's own interest in protecting the integrity of the trial and appellate processes.

Furthermore, apart from this Court's recognition of the need to prevent unnecessary disruptions of state trials, equal protection concerns also support requiring *Batson* claims to be asserted when they are most easily proven or refuted. A timely *Batson* claim is more targeted to ameliorating the principle harms caused by invidious discrimination; namely, the harm to the dignity of improperly-excluded jurors and the harm to the fairness and integrity of the justice system. *Batson* at 87-88. These harms are best remedied when the objection is timely enough to give the trial judge a realistic opportunity to allow improperly-excluded panelists to sit on the venire, if not on the jury itself. Given Montana's explicit recognition of the "inviolable" dignity of all persons (App. 2, ¶ 10), this is especially evident in Montana. However, Ford's untimely and disruptive request for a new venire did not seek to uphold the rights of any alleged victims of invidious discrimination. Rather, Ford wanted a jury of his liking.

The Montana Court's analysis of federal law was perceptive. Its decision does not deserve inclusion in that narrow category of cases in which state courts, hostile or insensitive to federal rights, invoked procedural artifice to shield rights violations from judicial scrutiny, of which *Ford v. Georgia* is an unfortunate example. *See, e.g., James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (where the right to a vital jury instruction was lost because counsel asked for an "admonition" rather than an "instruction"); *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) ("an arid ritual of meaningless form");

NAACP v. Alabama, ex rel. Patterson, 357 U.S. 449, 457 (1958) (application of procedural rule was "pointlessly severe").

2. Ford Has Failed to Satisfy This Court's Criteria for Granting Certiorari.

While, as addressed below in subsection B, *Ford v. Georgia* is not controlling here, Ford fails to demonstrate a conflict among the circuits. To establish a conflict among the states, he principally relies on two lower court decisions, *State v. Burch*, 830 P.2d 357 (Wash. Ct. App. 1992) and *State v. Harris*, 852 P.2d 1248 (Ariz. Ct. App. 1993). It is difficult to see how Ford finds support in *Harris*, where the court applied a pre-*Batson* rule, dating back to 1977, requiring jury objections to be lodged before the jury is impaneled and the venire is dismissed. *Id.* at 1250-51. The Court in *Harris* rightly rejected the notion, as Ford similarly presses here, that *Ford v. Georgia* required a prior waiver rule expressly applying to peremptory challenges attacked under *Batson*. *Id.* Like Arizona, Montana followed a preexisting contemporaneous objection rule and the Montana legislature required jury objections to be made before the jury is sworn. (App. 2, ¶ 27; App. 3.)

Burch, a post-*Batson* case, relied upon *Ford v. Georgia* for the proposition that state courts are free to adopt procedures governing when a *Batson* objection would be considered untimely. The defendant, a black man, was tried and convicted by an all-white jury after the only African-Americans on the venire were excluded. *Burch* was based upon the court's conclusion that only the Washington Supreme Court could amend

the rules of appellate procedure governing when a *Batson* claim must be made. *Id.* at 364.

State v. Wright, 896 P.2d 713 (Wash. Ct. App. 1995), upon which Ford secondarily relies, was decided by the same Washington Court of Appeals. It simply followed *Burch*. *Wright* at 719. As an aside, *Wright* rejected the notion, pressed by Ford in the Montana Court, that a *Batson* violation can be established based upon "numbers alone." *Wright* at 718.

Calhoun v. Purvis, 425 S.E. 2d 901 (Ga. Ct. App. 1992), another lower court decision, was a civil case involving a black plaintiff who received an all white jury after the defense struck all African-Americans from the venire. A *Batson* objection was made after the jury was selected, but before it was seated. The trial judge denied the objection, refusing to apply *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991), absent a ruling from the Georgia Supreme Court. On appeal, the court in *Calhoun* determined that the Georgia Supreme Court's earlier opinion in *Sparks* did not apply because of unique differences in procedure between civil and criminal cases in Georgia. *Calhoun* at 903-04.

Like the Georgia Supreme Court's decision in *Sparks*, it was the prerogative of the lower courts in *Calhoun, Wright* and *Burch* to require a specific *Batson* time bar. However, neither Washington nor Georgia laws speak to Montana law. *Batson* explicitly refrained from requiring uniform implementation. *Hernandez* at 358; *Batson* at 99. While *Batson* left open the possibility of a uniform federal rule governing when *Batson* objections are too late, *id.*, it would be inconsistent with principles of federalism, and this Court's expression of deference to the states in *Batson* itself, to require each state to

develop a specific bar as a federal requisite to barring a purported *Batson* claim for the first time. The fact that some states have adopted or required specific time bars did not require Montana to fall in line and, as discussed below, *Ford v. Georgia* imposed no such federal mandate.

B. *Ford v. Georgia* Is Not Controlling.

Relying upon *Ford v. Georgia*, Ford is making an as-applied challenge. Ford does not contend that Montana's contemporaneous objection rule was, in itself, not "fairly established and regularly followed by the time as of which it is to be applied." *Id.* at 422. Rather, he argues that Montana cannot procedurally bar a *Batson* claim in a case of first impression and that its decision to apply a different procedural bar than Montana argued on direct appeal was novel. However, *Ford v. Georgia* does not hold that a state court can never procedurally bar a purported *Batson* claim in case of first impression. Nor does it prohibit application of a bar, comparable to one a state is relying upon, sua sponte. *Ford v. Georgia* involved Georgia's extraordinarily novel application of its 1987 decision in *Sparks*. Here, in contrast, if procedural novelty exists, it is of Eugene Ford's own making.

1. Unlike Georgia Counsel Prior to *Batson*, Montana Counsel Had Fair Notice of the Need to Make a Timely Objection.

Ford v. Georgia was a capital case involving a black defendant who was convicted of kidnapping, raping and killing a white woman. The defendant's counsel filed a pretrial motion alleging, as then required by *Swain*, that the prosecutor was guilty of excluding black panelists in case after case. As predicted in counsel's pretrial motion, the

prosecutor used nine of his ten strikes against black panelists. *Id.* at 413-15. On direct appeal, the Georgia Court procedurally barred James Ford's claim on two grounds.

First, after this Court remanded the case in light of *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Georgia Court held that "nothing in *Griffith* would warrant the extension of relief upon grounds not raised at trial." *Ford v. State*, 362 S.E.2d 764, 765 (Ga. 1987). However, this Court held that with respect to cases pending on direct review when *Batson* was decided, it would treat *Swain*-type objections as *Batson* claims. Because the petitioner in *Batson* made a *Swain*-type objection, this Court declined to hold parties in the pre-*Batson* era to a higher standard than applied in *Batson* itself. *Id.* at 855-56. As Montana argued at oral argument below (in response to Ford's reliance upon *Ford v. Georgia* in his reply brief), *Ford v. Georgia* "addressed what steps a defendant in a criminal case was required to take to preserve an equal protection objection to the State's race based use of peremptory challenges during the pre-Batson era." *Trevino* at 566.

The Georgia Court also determined, sua sponte, that James Ford's *Swain*-type objection was untimely pursuant to the Court's 1987 decision in *Sparks*. *Ford v. Georgia* at 417. However, the procedural novelty in *Ford v. Georgia* was not a function of the Court's decision to apply *Sparks* sua sponte. Rather, the novelty stemmed from the fact that *Sparks* did "not even remotely" constitute an independent and adequate procedural bar. *Id.* at 424.

Sparks held that a *Batson* objection would be considered untimely, and therefore waived, unless the objection was made before the venire was dismissed and the jury was sworn. However, the Georgia Court's application of *Sparks* to bar James Ford's

objection was novel in three respects. First, *Sparks* was decided in 1987, well after James Ford's 1984 trial. Secondly, the Georgia Court's holding in *Sparks* was prospective only. Finally, the equal protection objection in *Ford v. Georgia* was made before trial. *Sparks* could not adequately bar a pretrial objection because *Sparks* prospectively determined when a *Batson* objection would be too late; *Sparks* did not determine when such an objection would be considered premature. Accordingly, this Court held that *Sparks* was inadequate to bar James Ford's pretrial objection. *Id.* at 424, 425 n.7.

Unlike Georgia counsel prior to *Sparks* and *Batson* itself, Eugene Ford's trial counsel was on notice of this Court's opinions in *Batson* and *J.E.B.*, and numerous federal decisions noting the importance of a timely objection in the *Batson* context. Ford's trial occurred in 1999, thirteen years after *Batson* was decided and five years after *J.E.B.* was decided. The importance of making a timely objection is familiar to the law of this nation, *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977) and, pertinently, to the law of Montana. (App. 2, ¶ 27.)

Furthermore, in contrast to the Georgia Court's very novel sua sponte application of *Sparks*, the interests and policies underlying the bar the Montana Court applied are identical to the interests Montana sought to invoke on appeal. And Montana's argument that Ford was making a misguided fair cross-section objection assumed that the objection, however it was characterized, was untimely. Montana noted in its brief that the objection was made after the jury was empanelled (Resp. Br. at 4), and the timing of the objection was addressed during oral argument. *Compare Batson* at 84 n.4.

Independent of Montana's contemporaneous objection rule, Ford's counsel also had notice that the Montana legislature required jury challenges to be made before the jury is sworn. Mont. Code Ann. § 46-16-117. Because this statute "is a solemn expression of the will of the supreme power of the state[,]" Mont. Code Ann. § 1-1-101, its adequacy, in a state with as few people as Montana, should not turn upon whether the Montana Court has previously applied it in the *Batson* context. In his petition for rehearing, Ford was given the opportunity to make the argument he is restating here, i.e., that the statute does not apply, but the Montana Court rejected Ford's argument. (App. 3.) In any event, Ford's "jury by his peers" objection was a challenge both to the composition of the jury and to individual jurors whom Ford presumably did not want to be seated because of their gender or the peer requirement. Therefore, the statute applied.

"The adequacy of a state ground, of course, does not depend on an appellate decision applying general rules to the precise facts of the case at bar." *Lee v. Kemna*, 534 U.S. 362, 122 S. Ct. 877, 889 (2002). And, in *Ford v. Georgia*, this Court did not hold that the states must develop specific rules expressly applicable to *Batson* claims--as the Georgia Court happened to have done in *Sparks*. Even if we assume that Georgia had pre-*Sparks* timeliness rules comparable to Montana's, the Georgia Court's decision in *Sparks* itself precluded Georgia from arguing that an adequate bar existed in Georgia prior to 1987, when *Sparks* was decided. In contrast, in this post-*Batson* case, Eugene Ford's counsel had adequate notice of the time bars the Montana Court applied. And unlike the Court in *Sparks*, the Montana Court did not make its decision prospective only, nor was it required to do so. *Ford v. Georgia* does not speak to Montana law, and it

would be incompatible with principles of federalism and comity (reflected in *Batson* and *Ford v. Georgia*) to effectually tether Montana law to the nuances of Georgia law and the Georgia Court's very novel application of its later, prospective-only decision in *Sparks* to bar as untimely a pretrial, pre-*Batson*, *Swain*-type equal protection claim.

2. Ford, Not the Montana Court, Is Guilty of Novelty.

In contrast to the procedural firewall at issue in *Ford v. Georgia*, it is Ford's claim, not the Court's handling of it, which is novel here. On direct appeal, Ford's untimely "jury by his peers" objection was transformed not only into a *Batson* claim, but a proven *Batson/J.E.B.* violation purportedly requiring automatic reversal of Ford's deliberate homicide conviction. After perusing the cold record, Ford contrived that he had proven a prima facie case, or that the prosecutor mooted that requirement; he unfairly characterized the prosecutor's gender-neutral explanations for removing two panelists as a plan to get rid of two women; he belatedly complained about the prosecutor's supposed fatal failure to give his reasons for striking one panelist and, he attempted to overlay this Court's three-step *Batson* analysis onto a trial record where no timely or specific *Batson* objection was raised, no three-step *Batson* hearing was held, and where Ford's counsel did none of things one would expect if he were asserting a *Batson* violation or claiming to have proven any such thing. Apart for the fact that the objection was untimely, each of Ford's *Batson* arguments was made for the first time on appeal. It was not "exorbitant," *Lee v. Kemna*, 122 S. Ct. at 885, or the least bit novel for the Montana Court to bar them.

The procedural bar at issue in *Ford v. Georgia* was pointless and harsh. Here, in contrast, Ford's Montana counsel was on notice.

III. THIS COURT'S OBLIGATION TO UPHOLD IMPORTANT FEDERAL RIGHTS DOES NOT REQUIRE IT TO SANCTION FORD'S CHARADE.

Finally, this Court's federalism jurisprudence presupposes a cognizable federal claim or federal interest justifying a determination that state law is inadequate. This principle inheres in Justice Holmes' oft-quoted statement in *Davis v. Wechsler*, 263 U.S. 22, 23 (1923), "Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Here, Ford did not "plainly and reasonably" raise a *Batson* violation in trial court and it is not "inescapable that the defendant sought to invoke the substance of his federal right" within the meaning of this Court's precedent. *Cf. James*, 466 U.S. at 351.

Ford, a man, did not assert third-party standing to vindicate the purported rights of any excluded panelists pursuant to *Powers v. Ohio*. Rather, Ford's trial counsel raised Ford's personal right ("my client's right") to a "jury by his peers" or the fair cross-section requirement--a right often paradoxically at odds with equal protection principles. Ford's argument that the prosecutor treated his objection as a *Batson* claim, and that Montana waived any objection to its timeliness, assumes that the primary purpose of an adequate and timely objection is to give notice to a party, when its main purpose is to give notice to the trial court; it further assumes, incorrectly, that Ford made a specific *Batson* objection in trial court. (App. 2, ¶ 8.)

Although the Montana Court effectively treated Ford's "jury by his peers" objection according to pre-*Batson* standards of adequacy, *cf. Ford v. Georgia* and

Trevino, it nonetheless determined that its timing "deprive[d] the district court of the ability to correct any error in the proceedings in a timely fashion." (App. 2, ¶ 27.) Thus, notwithstanding the principle that a state cannot defeat federal jurisdiction based upon a bar its court did not apply, *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985), here, Montana's non-jurisdictional opposition to certiorari review stresses that Montana shares the federal forum's interest in requiring objections "ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action. . . . *Cf. Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965). *See also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940). The trial is the "main event." *Wainwright* at 90.

This Court has refused to deem state laws adequate when their application serves no "perceivable" state interest. *See, e.g., Lee v. Kemna*, 122 S. Ct. at 886; *Osborne v. Ohio,* 495 U.S. 103, 124 (1990); *James* at 349. Here, comity counsels invocation of a corollary principle, deference, because a substantive *Batson* claim was not amply and timely raised, let alone amply and timely proven.

Despite failing to specifically raise and timely prove a *Batson* violation in trial court, Ford's novel approach did not stop there. On direct appeal, he argued that a pattern of six strikes, in and of itself, would constitute prima facie and ultimate proof of invidious discrimination against women in what was, in essence, a domestic violence murder involving a male perpetrator's claim of self-defense. However, while proof of invidious intent "may include proof of disproportionate impact," more is required unless no possible non-discriminatory explanation exists. *Batson* at 93. Ford's trial counsel

himself exercised an amazing two-thirds (four) of his six strikes against women, which illustrates why proof under *Batson* is a question of invidious intent, rather than of disparate impact. *Hernandez* at 359-63. *Batson* contemplates a fact-intensive, case-specific inquiry. *Batson* at 95-98; *J.E.B.* at 129, 138-40 (where the targeting of males, based on gender stereotypes, resulted in an all-female jury in a paternity action).

Apart from the fact that four women served on Ford's jury, and notwithstanding Ford's failure to timely raise a specific *Batson* claim and to timely rebut the prosecutor's explanations (as required by *Batson*), a discriminatory intent was neither "inherent" in the prosecutor's reasons for striking McKinney and Leiby, nor in his inadvertent failure to mention his reasons for striking Carlisle. *Cf. Purkett at* 768. Rather, Ford was asking the Montana Court to turn jury selection into a disparate impact trial at which the proponent of the strikes would have the ultimate burden of proof when "the ultimate burden of persuasion . . . rests with, and never shifts from, the opponent of the strike." *Id.* As discussed above, if the prosecutor here had a discriminatory plan, he miserably failed to execute it when he chose not to join in defense counsel's challenge for cause to Leraas.

While the federal forum does not have a reasonable interest in allowing Ford to continue on with his artful attempt to reverse a Montana homicide conviction, Montana's interest in barring a post-*Batson* claim so poorly presented and ill-timed as Eugene Ford's is compelling. It is not an example of a state court's developing novel, ad hoc, and pointlessly severe procedural hurdles in order to thwart judicial scrutiny of invidious discrimination.

Finally, although the Montana Court did not reach the merits of the claim, the idea that it was employing procedural artifice to cover up gender discrimination does not ring true. The Montana Court vigilantly upholds the right of all Montanans to "inviolable" human dignity, *see, e.g., In re K.G.F.*, 2001 MT 140, ¶ 45, 306 Mont. 1, 29 P.3d 485, but it was not compelled to jump to the merits of a claim beset with so many problems. And this Court's responsibility for upholding federal rights does not force the conclusion that, in the final analysis, an effective state court *Batson* challenge is one which is non-specific, disruptive, unproven, contrary to this Court's decisional law, and untimely.

CONCLUSION

For the foregoing reasons, Montana respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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September 2002

IN THE DISTRICT COURT · THE EIGHTH JUDICIAL DISTRICT · STATE OF MONTANA
IN AND FOR THE COUNTY OF CASCADE

State of Montana — Plaintiff
vs.
Eugene Ford — Defendant

Case No. DC-99-102

JURY LIST

FILED
NOV 8 1999
NANCY MORTON
Clerk of District Court
BY: R. Wilson DEPUTY

		STATE'S OR PLAINTIFF'S CHALLENGES	DEFENDANT'S CHALLENGES	EXCUSED FOR CAUSE	
1	Kathy Brunate				
2	Jason Hilsinger				
3	Ralph Nebel				
4	Anna Grabarski	S-1			
5	Darrel Pegan				
6	Lloyd Locke				
7	Mary English		D-6		
8	Linda Berg	S-2			
9	Gary Gillis		D-2		
10	Monica Haarr				
11	Melena Robinson				
12	Will Kegel				
13	Rita Leiby	S-5			
14	Lisa McKinney	S-4			
15	Robert Strunk		D-4		
16	Dawn Gates				
17	Helen Carlisle	S-3			
18	Sue Quinn		D-1		
19	Brian Hinz Hall		D-3		
20	James Whitted				
21	Lou Easley				
22	Helen Swarthout		D-5		
23	Erica Larson	S-6			
24	John Fellman				
25					
26	W B Johnson	S-A-1			
27	Terry Berard		D-A-1		
28	Jennifer McLaughlin				
29					
30					
31					
32					

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No. 00-337

IN THE SUPREME COURT OF THE STATE OF MONTANA

2001 MT 230

STATE OF MONTANA,

Plaintiff/Respondent,

v.

EUGENE FORD,

Defendant/Appellant.

FILED
NOV 20 2001
Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

APPEAL FROM: District Court of the Eighth Judicial District,
In and for the County of Cascade,
The Honorable Thomas McKittrick, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Kristina Guest, Appellate Defender Office, Helena, Montana

For Respondent:

Mike McGrath, Montana Attorney General, Mark W. Mattioli, Assistant Attorney General, Helena, Montana; Brant S. Light, Cascade County Attorney, Great Falls, Montana

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Heard: July 24, 2001
Submitted: August 9, 2001
Decided: November 20, 2001

Filed:

Clerk

Justice Patricia O. Cotter delivered the Opinion of the Court.

¶1 On November 12, 1999, a unanimous jury in the Eighth Judicial District, Cascade County, found Eugene Ford (Ford) guilty of deliberate homicide, a felony. He was sentenced to the Montana State Prison for life and was declared ineligible for parole. Ford appeals from this verdict and sentence.

¶2 The issue presented for review is whether the District Court properly denied Ford's motion for the impanelment of a new jury. Ford alleges that the State violated his equal protection rights by improperly exercising its peremptory challenges so as to exclude women from Ford's jury panel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 In March 1999, Ford was charged with the offense of deliberate homicide involving the death of his roommate, Michael Paul. Ford's trial commenced on November 8, 1999, with selection of the jury. A review of the trial Transcript indicates the venire, comprised of fifty prospective jurors, appeared as instructed and were sworn as to their qualifications to serve as trial jurors in the case at bar. From the list of names of the prospective jurors, it appears the venire was evenly split between males and females. The first twenty-four prospective jurors, sixteen females and eight males, were drawn and the State's voir dire examination commenced. One male was excused for cause and replaced by another male. The State then passed the prospective jurors for cause and Ford's attorney conducted his voir dire examination. He challenged two female prospective jurors for cause, and they were excused

and replaced by two males. One of these males was then excused for cause and replaced with another male. At this point, the prospective jury panel consisted of fourteen females and ten males.

¶4 Each party was allotted six peremptory challenges. The State exercised its peremptory challenges, excusing six females from the prospective jury panel. Ford then exercised his peremptory challenges, excusing four females and two males. Three prospective alternate jurors were drawn, two males and one female. The State excused one male and Ford excused one male. The final jury, comprised of eight males, four females and one female alternate juror, was then sworn, and the remaining venirepersons were dismissed with the thanks of the Court.

¶5 After the jury was sworn and the venire dismissed, and outside the presence of the jury, Ford's attorney then moved for a new jury pool, claiming the State had exercised its peremptory challenges "in violation of [Ford's] right to a jury by his peers" by striking six women. The State, without verbal prompting from the District Court, offered explanations for striking five of the six excused prospective jurors. The District Court noted Ford's objection, but without explanation or reason, overruled his objection. The trial then proceeded.

¶6 Upon completion of the trial, a unanimous jury found Ford guilty of deliberate homicide. He was sentenced to the Montana State Prison for life and was declared ineligible for parole.

STANDARD OF REVIEW

¶7 The issue of gender discrimination in jury selection is a case of first impression for this Court, and while the parties do not agree as to the appropriate standard of review this Court should apply to the case at bar, it is well established that when considering a *Batson* challenge, *i.e.*, a challenge that a litigant has exercised its use of peremptory strikes in a discriminating manner, an appellate court will defer to the trial court's findings of fact unless clearly erroneous, and will review the trial court's application of the law de novo. *Tolbert v. Page* (9th Cir. 1999), 182 F.3d 677, 1999 U.S. App. LEXIS 14201. See also *Brewer v. Marshall* (1st Cir. 1997), 119 F.3d 993, 1997 U.S. App. LEXIS 18147.

DISCUSSION

¶8 In making his objection at trial to the peremptory challenges exercised by the State, Ford's counsel claimed that the State had violated his right "to a jury by his peers." It was not until he filed his appeal that Ford first labeled his dispute over the State's exercise of peremptory challenges a "Batson" challenge. (Appellant's Brief, p. 17). Because this Court has not previously addressed *Batson* and its progeny, we deem it appropriate to briefly review the history and evolution of the *Batson* challenge to jury composition.

¶9 All citizens of this country and of this state are guaranteed equal protection under the laws by the United States Constitution and the Montana Constitution. Section 1 of the Fourteenth Amendment of the United States Constitution reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

> they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¶10 Article II, Section 4 of the Montana Constitution reads:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

These constitutional provisions are intended to eliminate governmental discrimination based upon race, gender, religion, or political philosophy.

¶11 In a landmark case in 1880, the United States Supreme Court, explaining a function of the recently ratified Fourteenth Amendment (1868), informed the State of West Virginia that its juror qualification statute, allowing only "white male persons" to be eligible for jury service, was a violation of a black defendant's right to a jury selected "without discrimination against all persons of his race or color, because of their race or color." *Strauder v. West Virginia* (1880), 100 U.S. 303. In 1881, the facts of *Neal v. Delaware*, 103 U.S. 370, prompted the U.S. Supreme Court to extend *Strauder* by holding that Delaware's refusal to call black citizens to jury duty was also unconstitutional. Since that time, the Fourteenth Amendment has repeatedly been invoked to support the eradication of discrimination in the jury selection process.

¶12 While these early Supreme Court opinions instructed states to include black citizens in venires, they failed to guarantee that black citizens would actually serve on juries.

Through the use of peremptory challenges, prosecutors were for many years generally successful in eliminating black juror participation. Stephen R. DiPrima, Note: *Selecting a Jury in Federal Criminal Trials After Batson and McCollum*, 95 Colum. L. Rev. 888, 900 (1995).

¶13 Courts throughout our history have lauded the importance of peremptory challenges to our judicial system. The peremptory challenge "is one of the most important of the rights secured to the accused." *Pointer v. United States* (1894), 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208, 214. It is "an essential part of the trial," and, more specifically, it is "essential to the fairness of trial by jury." *Lewis v. United States* (1892), 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011, 1014. See also, *Holland v. Illinois* (1990), 493 U.S. 474, 484, 110 S.Ct. 803, 809, 107 L.Ed.2d 905, 919.

¶14 Peremptory challenges are used during voir dire to strike members of the venire who the striking party prefers not to have on the jury, usually because of a perceived bias on the part of the potential juror. Unlike strikes for "cause," which are accompanied by an expressed reason for the strike, peremptory strikes may be exercised without having to explain the reason behind them. Peremptory strikes are often based primarily on instinct, and are cherished tools, guarded protectively by litigators. It in undeniable, though, that an unfortunate consequence of not having to explain the peremptory strike has been that persons have been excluded from jury participation because of their race or gender. However, as long as the use of the peremptory challenge was unfettered, any discriminatory motive would

be unproven and, in any event, immaterial.

¶15 The unrestrained use of peremptory challenges came to an end with *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. In *Batson*, the U.S. Supreme Court developed the rule that the state, in a criminal case, cannot utilize its peremptory challenges to remove prospective jurors on the sole basis of race. Batson was a black man indicted in Kentucky on charges of second degree burglary and receipt of stolen goods. During jury selection, the prosecutor used his peremptory challenges to strike all four black persons on the venire, and an all-white jury convicted Batson on both counts. Defense counsel argued to the trial court at the time of jury selection that the prosecutor's use of his peremptory challenges violated Batson's rights under the Sixth and Fourteenth Amendments. In keeping with the attitude that peremptory challenges were sacred, the trial court informed defense counsel that peremptory challenges could be used to "strike anybody they want to." The Kentucky Supreme Court affirmed the trial court. *Batson*, 476 U.S. at 83-84.

¶16 The United States Supreme Court reversed the lower court's decision. The Court held that purposeful racial discrimination by the government in the jury selection process was a violation of the Equal Protection Clause of the Constitution. *Batson*, 476 U.S. at 89. The Court set out a three-prong procedure to be used by the trial court when determining whether such a violation had occurred. First, the defendant must make out a prima facie case of purposeful discrimination. Then, the state must provide race-neutral explanations for its peremptory strikes. The trial court must then proceed to determine if the defendant has

established purposeful discrimination. *Batson*, 476 U.S. at 97-98.

¶17 The Supreme Court also set forth those factors necessary to establish a *prima facie* case of purposeful discrimination: 1) the defendant must show that he or she is a member of a cognizable racial group; 2) the defendant must show that the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; and 3) defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used the peremptory jury selection practice to exclude members of the venire from the petit jury on account of their race. *Batson*, 476 U.S. at 96.

¶18 As indicated above, the standard of review to be applied by an appellate court to a *Batson* challenge depends upon the issue being appealed. If the issue on appeal is a matter of law, such as the timeliness in which a *Batson* challenge is made, the appellate court will review the trial court's application of the law de novo. If the issue is a factual one, however, e.g., whether a party has established a prima facie case for discrimination, an appellate court will defer to the trial court's findings of fact unless clearly erroneous. *Tolbert*, 182 F.3d at 684. Therefore, it is imperative that the trial court fully develop a record for review - a record that includes all relevant facts and information relied upon by the trial court to render its decision, as well as a full explanation of the court's rationale. *United States v. Diaz* (11th Cir. 1994), 26 F.3d 1533, 1994 U.S. App. LEXIS 19495.

¶19 Over the years since *Batson* was decided, the U.S. Supreme Court has expanded Batson's scope and "reaffirmed repeatedly [its] commitment to jury selection procedures that

are fair and nondiscriminatory." *J.E.B. v. Alabama ex rel. T.B.* (1994), 511 U.S. 127, 128, 114 S.Ct. 1419, 1421, 128 L.Ed.2d 89, 97. For instance, the *Batson* rule no longer applies exclusively to prosecutors striking members of the venire who are the same race as the defendant. Any racially-motivated reason for striking a prospective juror is prohibited under *Batson*, whether the prospective juror shares the racial identity of the defendant or not. *Powers v. Ohio* (1991), 499 U.S. 400, 409, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411, 424. Moreover, the *Batson* challenge is no longer limited exclusively to the government in criminal actions. It has been extended to prevent a defendant in a criminal action from using peremptory challenges to exclude jurors based on race (*Georgia v. McCollum* (1992), 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33), and has also been applied to private litigants in a civil case. (*Edmonson v. Leesville Concrete Co.* (1991), 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660).

¶20 In addition to their application to racially motivated peremptory challenges, the *Batson* criteria have also been invoked to address other forms of discrimination in the jury selection process. The U.S. Supreme Court has relied on *Batson* to prohibit gender discrimination during jury selection. *J.E.B.*, 511 U.S. 127. On appeal, Ford premises his challenge to the State's use of its peremptory challenges to strike six women from the venire, upon *J.E.B.* and its progeny.

¶21 Ford argues that the State violated his Fourteenth Amendment rights by improperly exercising all of its peremptory challenges to exclude women from the jury panel. The State

responds that there was no discriminatory motive underlying its use of peremptory challenges, and that there would be no reason to systematically exclude women from the jury panel in a murder case involving a male defendant and a male victim. However, before we even consider the merits of Ford's claim, we must first evaluate the timeliness of the *Batson* motion. While defendants have a right "to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," *Batson*, 476 U.S. at 85-86, this right must be exercised in a timely manner. Failure to raise a *Batson* challenge in a timely manner results in the waiver of the challenge. *Morning v. Zapata Protein (USA), Inc.* (4th Cir. 1997), 128 F.3d 213.

¶22 When establishing the elements of a *Batson* challenge, the *Batson* Court did not specify at what point in time in the proceedings an objection must be made in order to be timely. As this is a case of first impression for this Court, we look to other courts for guidance.

¶23 Several jurisdictions have closely analyzed *Batson's* language and concluded that the U.S. Supreme Court envisioned that a *Batson* challenge must be made before the jury is sworn. *State v. Wilson* (1993), 117 N.M. 11, 868 P.2d 656; *United States v. Cashwell* (11th Cir. 1992), 950 F.2d 699, 704; *United States v. Dobynes* (8th Cir. 1990), 905 F.2d 1192, 1196, cert. denied (1990), 498 U.S. 877, 111 S.Ct. 206, 112 L.Ed.2d 167. These courts note that in Footnote 24 of the *Batson* opinion, the U.S. Supreme Court offered the following alternative possibilities upon a finding of discrimination: the court may discharge the venire

and select a new jury from a panel not previously associated with the case, or it may disallow the discriminatory challenges and resume selection, with the improperly challenged jurors reinstated on the venire. Clearly, both of these options presuppose resolution of the objection before a jury is sworn.

¶24 Numerous courts have held that not only must a *Batson* challenge be issued before the jury is sworn, but it must also be raised before the venire is dismissed. *See United States v. Biaggi* (2d Cir. 1990), 909 F.2d 662, 679; *Government of Virgin Islands v. Forte* (3d Cir. 1986), 806 F.2d 73, 76; *Morning*, 128 F.3d at 216; *United States v. Abou-Kassen* (5th Cir. 1996), 78 F.3d 161, 167; *United States v. Rodriquez* (11th Cir. 1990), 917 F.2d 1286, 1288; *State v. Cummings* (Mo. Ct. App. 1992), 838 S.W.2d 4, 6; *Sorensen v. State*, 2000 Wyo. LEXIS 143, 6 P.3d 657, 662; *State v. Harris* (1988), 157 Ariz. 35, 36, 754 P.2d 1139, 1140.

¶25 There are several reasons why a *Batson* challenge must be raised before the jury is sworn and the venire dismissed. The *Wilson* court, embracing the *Cummings* rationale, stated:

> There simply is no justification for defense counsel to wait until the remaining venirepersons are discharged to challenge the state's peremptory strikes. If defense counsel does wait until the venire panel is discharged and the challenge is sustained, then the jury selection process must start anew, and an additional venire panel must be called. This simply delays justice, and, in those jurisdictions where an additional venire is not readily available, the delay can be substantial.

Wilson, 117 N.M. at 15-16, quoting *Cummings*, 838 S.W.2d at 6.

¶26 Additionally, in *Allen v. State* (Tx. Ct. App. 1987), 726 S.W.2d 636, 1987 Tex. App.

LEXIS 6672, the Texas Court of Appeals, citing *United States v. Erwin* (5th Cir. 1986), 793 F.2d 656, explained that a *Batson* objection made before the venire is dismissed puts the prosecutor on notice that he or she may be required to provide race-neutral explanations for the peremptory strikes. With the venire still before the prosecutor, he or she has the opportunity to associate the names and faces of the stricken veniremembers with the reasons for striking them. This task becomes very difficult once the persons to whom the peremptories were directed have disappeared from sight, especially where, as here, the defendant challenges as many as six strikes.

¶27 If we allow a *Batson* challenge to be raised after the jury is impaneled and sworn and the venire dismissed, we not only impair the ability of the challenged attorney to effectively defend his or her strikes, but we also deprive the district court of the ability to correct any error in the proceedings in a timely fashion. While we have not previously addressed the *Batson* challenge explicitly, the concept of requiring a substantive challenge to be brought while the district court still has the opportunity to cure the alleged defect is not novel. We have consistently held that the purpose of a timely objection is to give a district judge the first opportunity to correct any error. *See State v. Tucker*, 2000 MT 255, 301 Mont. 466, 10 P.3d 832; *State v. Clausell*, 2001 MT 62, 305 Mont. 1, 22 P.3d 1111; *State v. Finley* (1996), 276 Mont. 126, 915 P.2d 208 (overruled in part on other grounds by *State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817); *State v. Weinberger* (1983), 204 Mont. 278, 665 P.2d 202.

¶28 We conclude that because Ford's counsel waited until after the jury was impaneled

and sworn and the venire dismissed to raise his *Batson* challenge, his motion was untimely and was therefore waived. Accordingly, we will not address the merits of his claim.

¶29 The decision of the District Court is affirmed.

Justice

We Concur:

Chief Justice

Justices

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HELENA, MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 00-337

STATE OF MONTANA,

Plaintiff and Respondent,

v.

EUGENE FORD,

Defendant and Appellant.

FILED
JAN 31 2002
Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

ORDER

Eugene Ford, by counsel, has filed a Petition for Rehearing in this matter. The State has responded, urging us to deny the petition. We agree with the State.

Ford's jury panel objection, made after the jury had been sworn and after the venire had been dismissed, was not made in a timely manner. As noted in our Opinion, several jurisdictions have concluded that the U.S. Supreme Court intended that a *Batson* challenge be made before the jury is sworn. Other jurisdictions have adopted the rule that such a challenge may be raised after the jury is sworn but must be raised before the venire is dismissed. Ford did neither.

Furthermore, as our Opinion reflects, there exists in this State a well-established body of case law requiring substantive objections to be interposed while the district court still has the opportunity to cure the alleged defect. Any challenge to the composition of the jury made after dismissal of the venire deprives the district court of the ability to correct errors that may be identified by such a challenge. Moreover, in addition to this well-established body of case law, § 46-16-117, MCA, statutorily requires that all jury challenges must be interposed

before the jury is sworn. Ford failed to raise his objection until after the jury was sworn and the venire dismissed, and he thus deprived the District Court of the opportunity to address the alleged errors. Accordingly,

IT IS HEREBY ORDERED that the "Petition for Rehearing of Opinion" filed with this Court by Defendant and Appellant, Eugene Ford is DENIED.

DATED this 31st day of January, 2002.

Chief Justice

Justices

Justice Jim Rice dissenting.

I respectfully dissent from the Court's order. I would grant the petition and remand for a hearing.

Although Ford argues that his objection should have been considered timely, I remain convinced that the Court correctly held that a timely *Batson* challenge must be made before the jury is sworn and the venire dismissed. Ford's objection was made after the jury was empaneled and the venire dismissed, and was, therefore, untimely.

However, Ford also argues that the State did not object to the timeliness of his jury objection in the District Court, instead addressing the merits of the objection by offering gender neutral reasons for its challenges, and thus waived any objection to the timeliness of the claim. We have long held that failure to impose an objection at trial waives the issue for purposes of appeal. *State v. LaDue*, 2001 MT 47, 304 Mont. 288, 20 P.3d 775.

Ford convincingly argues that this rule applies when the State does not object to the timeliness of a *Batson* objection. As authority, he offers *People v. Harris* (Ill. 1989), 544 N.E.2d 357, a case in which the defendant challenged the State's exercise of its peremptory strikes. There, the prosecutor failed to object to the timeliness of the defendant's motion, but rather–like the situation here–opposed the motion on its factual merits. On appeal, the State argued that the defendant's motion had been untimely made. Citing the well-established rule, the Illinois Supreme Court concluded that the State had waived its argument that the defendant's jury objection was untimely, as "it is equally true that the principle of waiver applies to the State as well as to the defendant." *Harris*, 544 N.E.2d at 378.

The State asserts that a waiver by the prosecutor requires understanding about what kind of objection defendant's counsel was actually making, and that it was not until appeal that Ford actually labeled his objection a *Batson* challenge, as opposed to a challenge to the sufficiency of the venire panel pursuant to *Duren v. Missouri* (1979), 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579. I am convinced from the record that Ford's objection was directed to the propriety of the prosecutor's peremptory challenges, and that the prosecutor accurately understood the objection, to which he responded by offering nondiscriminatory reasons for his strikes.

The District Court failed to properly follow the process for evaluating Ford's objection as set forth in *Batson*, and failed to enter findings regarding the sufficiency of the prosecutor's gender-neutral explanations. I would remand this matter to the District Court to conduct a proper *Batson* hearing, with the further admonishment that the trial court need not accept at face value the State's ostensibly facially-neutral explanations for use of its peremptory challenges, but must consider whether the proffered reasons are designed to avoid admitting acts of discrimination. *See, David v. State* (Ala. 1998), 740 S.2d 1142.

Justice

Justice W. William Leaphart joins in the foregoing dissent of Justice Rice.

Justice

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STATE OF MONTANA

STATE OF MONTANA,

Plaintiff and Respondent,

v.

EUGENE FORD,

Defendant and Appellant.

ORDER

Eugene Ford, by counsel, has filed a Petition for Rehearing in this matter. The State has responded, urging us to deny the petition.

We deem it appropriate to permit Ford to file a reply brief in response to the arguments raised in the State's Response to the Petition for Rehearing. Although Ford may address any of the State's arguments, we invite Ford to address, in particular, the State's argument that the provisions of § 46-16-117, MCA, require that all challenges to the composition of the jury panel must be interposed before the jury is sworn. Accordingly,

IT IS HEREBY ORDERED that Ford shall be entitled, at his discretion, to file a reply brief addressed to the arguments raised by the State of Montana in its response to the petition for rehearing, said brief not to exceed ten pages, to be filed on or before January 15, 2002.

IT IS FURTHER ORDERED that the Clerk of this Court shall give notice of this Order by mail to all counsel of record.

DATED this 28th day of December, 2001.

Chief Justice

Justices

No. 01-10070

ORIGINAL

In The

SUPREME COURT OF THE UNITED STATES

EUGENE FORD,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
ss:
County of Lewis and Clark)

I, Bonnie R. Flesch, of legal age, being duly sworn according to law, upon my oath depose and say:

1. I am a legal assistant in the Office of Attorney General, Department of Justice, State of Montana.

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SUPREME COURT, U.S.

2. On Thursday, September 19, 2002, at the direction of Mark W. Mattioli, Assistant Attorney General, I served one (1) copy of the Brief in Opposition to Petition for Writ of Certiorari in the above matter upon Petitioner by placing the document in the U.S. Mail, first-class postage prepaid, addressed as follows:

Mr. William F. Hooks
Ms. Kristiina Guest
Montana Appellate Defender Office
34 West Sixth Avenue
P.O. Box 200145
Helena, MT 59620-0145

3. On this date I also placed in the U.S. Mail, first-class postage prepaid, the original and ten (10) copies of the Brief in Opposition to Petition for Writ of Certiorari addressed to the Clerk of the United States Supreme Court.

DATED: September 19, 2002 Bonnie K. Flaten

SUBSCRIBED AND SWORN to before me this 19th day of September, 2002.

Janet E. Meyers
Janet E. Meyers
Notary Public for the State of Montana
Residing in Helena, Montana
My Commission expires September 12, 2004